IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAVEL LAZARENKO,

Defendant.
/

No. CR 00-0284 MJJ

ORDER GRANTING IN PART AND DENYING IN PART RULE 29 MOTION AND DENYING MOTION FOR NEW TRIAL

Before the Court is Defendant's Renewed Motion Under Rule 29 and Motion for a New Trial. For the reasons set forth below, the Rule 29 motion is **GRANTED IN PART** and **DENIED IN PART** and the motion for a new trial is **DENIED**.

I. RULE 29 MOTION

A. Legal Standard

Rule 29(a) of the Federal Rules of Criminal Procedure requires a court to enter a judgment of acquittal "if the evidence is insufficient to sustain a conviction." In considering a Rule 29 motion, the Court "must determine whether, viewing the evidence in the light most favorable to the government, the jury could reasonably find the defendant guilty beyond a reasonable doubt." *United States v. Merriweather*, 777 F.2d 503, 507 (9th Cir. 1985). "The relevant question is whether . . . *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Alarcon-Simi*, 300 F.3d 1172, 1176 (9th Cir. 2002) (emphasis in original).

B. Analysis[1]

1. Wire Fraud

a. Evidence Supporting Fraud Theories

i. Property Fraud – Naukovy Farms

To prove the property fraud aspect of the wire fraud charges, the government was required to prove that Defendant had a specific intent to defraud, by means of false or fraudulent pretenses, representations, or promises, and obtained money or property as a result. 18 U.S.C. § 1343.[2] The jury instructions specified that the fraudulent representations at issue were "the allegedly false contracts for cattle sales submitted to Reinz Van Der Ploeg by Agafonov." Instruction No. 48.

Defendant contends that the government failed to plead and prove that he participated in, or had knowledge of, any false representation by Agafonov to Naukovy. The Court disagrees. With respect to the pleading issue, the Second Superceding Indictment ("SSI") adequately sets forth the basis on which the Naukovy property fraud rests. *See* SSI ¶¶ 20, 31-38. With regard to the issue of proof, there was considerable testimony during trial describing Defendant's detailed knowledge of and involvement in Naukovy's business activities during the relevant time period. A rational jury could have inferred that Defendant had knowledge of and involvement in Agofonov's fraudulent actions sufficient to support the government's property fraud theory.[3] Accordingly, the government's property fraud theory survives Defendant's motion.

ii. Honest Services Fraud

1. Naukovy Farms

18 U.S.C. § 1346 expanded section 1343 to include a scheme to deprive another of "the intangible right of honest services." To prove an honest services fraud charge, the government

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[1] As the parties are familiar with the facts, the Court will recite them only as necessary to explain its resolution of the issues discussed below.

[2] The government was also required to prove an analogous violation of Ukrainian law—here, Ukrainian Criminal Code Article 86.

[3] The Court notes that there is evidence in the record of Defendant's direct involvement in the syphoning of funds from Naukovy. Peter Kirichenko testified that Defendant told him to expect a wire transfer from Agafonov in the amount of $6 million. The record reflects that Kirichenko did not have direct contact with Agafonov and, therefore, the only way Agafonov could wire funds to Kirichenko's account was if Defendant told Agafonov where to send it.

needed to establish an analogous violation of Ukrainian law. The government relied on Article 165 of the Ukrainian Criminal Code, which requires an official act, taken for mercenary gain, contrary to the interest of service, causing material harm to the state or social interests. *See* Instruction No. 42.

Defendant argues that there is insufficient evidence in the record from which a reasonable jury could find honest services fraud with respect to Defendant's dealings with Naukovy Farms. Defendant's argument is unavailing, however, even if the basis of Naukovy honest services fraud must be limited to Defendant's role in Naukovy's inclusion within Directive 100 (which the government disputes). There is an abundance of evidence in the record regarding Defendant's extensive influence and control over Dnepropetrosvk generally and Naukovy Farms specifically during the relevant time period. While it is a close question whether the government proved that "Naukovy was placed on the Directive for a wrongful reason or that Lazarenko was involved in the composition of the list,"[4] the Court cannot say that no rational jury could make that finding. There is enough evidence in the record to support the inference that Defendant played a role in Naukovy's inclusion in the Directive and that he did so with the intent to receive illegal payments from Agafonov.

With respect to the issue of material harm, Defendant's suggestion that there may have been some benefit to Ukraine by including Naukovy within Directive 100 is irrelevant. If part of Defendant's plan was to siphon off money for personal gain—which a reasonable jury could have found—it is beyond cavil that that is material harm under Article 165.[5]

2. Peter Kirichenko[6]

Even assuming the sole issue as to honest services fraud relating to Peter Kirichenko is whether the placement of Kirichenko's company, Agrosnabsbyt, within Directive 100 forms the basis of an honest services violation, there was sufficient evidence presented at trial to support the

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[4] Defendant's Reply in Support of Renewed Motion Under Rule 29 and Motion for a New Trial ("Reply") at 25.

[5] This is especially so in light of the fact that "material harm" encompasses both tangible and intangible harm. *See* Instruction No. 51.

[6] "Peter Kirichenko" is how this subject was labeled in the special verdict form. The Court follows that format here.

jury's verdict, for the same reasons set forth above.

As for material harm, the jury could have reasonably concluded that Defendant's role in Agrosnabsbyt's placement within the Directive flowed from Defendant's desire to personally profit from that business. A reasonable jury could further have found that the subsequent diversion of monies from Agrosnabsbyt to Defendant caused harm to the Ukrainian State (the authority of which is undermined and tarnished when high government officials extort businesses)[7] and to Kirichenko himself. *See* Instruction No. 41 (material harm encompasses harm to "the interests of society *or individuals*") (emphasis added).

b. Tracing[8]

i. Counts 20-23 (Wire Fraud); 43-46 (ITSP)

These counts allege transfers between June 23, 1997 and July 11, 1997 from an ORPHIN account in Poland to a EuroFed account with Commercial Bank of San Francisco and Pacific Bank in the Northern District of California. The Court has thoroughly reviewed the record with respect to these transfers. No reasonable jury could find that the transfers represented the proceeds of Kirichenko extortion or Naukovy fraud. As for the latter, the government all but concedes that the funds attributable to the Naukovy fraud did not find their way to Kirichenko's ORPHIN account in Poland, from which the four wire transfers at issue derived. *See* United States' Opposition to Defendant's Renewed Motion Under Rule 29 and Motion for a New Trial ("Opp.") at 88 ("although Kirichenko's ORPHIN account in Poland did not directly receive any of the money stolen from

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[7] *See* Instruction No. 51 ("'material harm' can include abstract forms such as, among others, undermining the authority of the State and violating the rights and freedoms of the individual").

[8] An important issue given little attention in the briefing but addressed at length at the hearing on this motion is what, if any, tracing principles should apply to the wire fraud counts. Defendant argued at the hearing that the tracing principles used with respect to the interstate transportation of stolen property ("ITSP") counts should apply to the wire fraud counts, *i.e.*, if there were sufficient "clean" funds in an account to cover the withdrawal, then the withdrawal must be deemed "clean." *See* Instruction No. 60. The government argued, *inter alia*, that the absence of case law in this area suggests that there is no tracing requirement in the wire fraud context. (Supplemental briefing on this issue yielded little to guide the Court.)

After consideration of the issue, the Court finds that the government has the better argument. Defendant has failed to provide any authority supporting his position that a tracing analysis is compelled under current law, nor has the Court found any legal authority that embraces Defendant's position. Accordingly, the government's failure to trace according to formal legal principles does not provide a basis to overturn the verdict on the wire fraud counts.

Naukovy State Farm . . ."). Yet it maintains that, while Kirichenko's ORPHIN account in *Switzerland* received most of the Naukovy money, Kirichenko "could have paid" Defendant those monies from some other account. *Id.* From this alone, the government posits that "the jury could have concluded that [the four transfers at issue] represented some portion of the money the defendant got from Naukovy State Farm." *Id.* The Court finds that while the jury may well have reached that conclusion, such a conclusion would not be reasonable in light of the overwhelming record evidence demonstrating that no money from any account of Naukovy Farms ever passed through the ORPHIN account in Poland. *See* SSI ¶¶ 20(d); 20(h); 25(c); 4/23/04 (Tonna) RT 12-31; 5/27/04 (Boersch closing) RT 112-13 ("The ORPHIN account contained clean money. It was clean when it came in. It was Mr. Kirichenko's trading profits. What makes it illegal is that he then pays half of these profits to the defendant.").

With respect to the contention that these four wire transfers represented Kirichenko extortion payments, the record reflects that the roughly $12 million flowing into the ORPHIN account in Poland between June 1, 1997 and July 11, 1997 came from M Invest Agency and Ronly Holdings. 4/23/04 (Tonna) RT 61-65.[9] Kirichenko, however, never suggested in his testimony that he had any relationship with M Invest or Ronly Holdings, or that those businesses had any connection to Agrosnabsbyt or any other business venture with which he was connected. Rather, he testified that after 1995, the ORPHIN account in Poland was receiving large sums of money from third parties. *Id.* at 74-75. While the government now claims that Kirichenko had a business relationship with Ronly Holdings (Opp. at 11 n.7, 25, 88), there is simply no evidence of this in the record. It appears just as likely that the wire transfers at issue were pass-throughs from third parties, which the government concedes cannot support the charges here.

In sum, no reasonable jury could conclude beyond a reasonable doubt that the four wire transfers represented by Counts 20 through 23 and 43 through 46 contained the proceeds of

[9] On June 1, 1997, the account balance was $15,000. 4/23/04 RT 61-62.

Kirichenko extortion or Naukovy fraud. These counts must therefore be dismissed.[10]

ii. Counts 24 (Wire Fraud) and 47 (ITSP)

These counts allege an $8.2 million transfer on July 30, 1997 from the GHP account in Geneva to a EuroFed account at Merrill Lynch in the Northern District of California. Agent Tonna testified that the sources of the $8.2 million were entities called LITAT, Fercometal and Phillipe Khair, none of which the government established to be a criminal source. 4/23/04 RT 69-72. More importantly, Kirichenko testified that the $8.2 million came from Yulia Tymoshenko. 4/08/04 RT 137-138. "The money came from UESU from Tymoshenko, and then was transferred to Eurofed." *Id.* at 222. He added that the money may have come from LITAT, which was "one of the companies that does gas business and Yulia Tymoshenko is at the head of it." *Id.*

In the face of this evidence, the government responds that the jury could have concluded that the transfer included money that had been extorted from Kirichenko. Specifically, the government notes that Kirichenko's profits from the GHP deal, of which Defendant received half, were deposited into this account. However, the Court dismissed the allegations relating to the GHP fraud in its mid-trial Rule 29 order, and the SSI does not allege the GHP deal as a basis for the extortion allegations. In light of the testimony of Tonna and Kirichenko, and given the lack of evidence supporting the government's theory here, the Court finds that no reasonable jury could find that these transfers contained the proceeds of fraud or extortion.[11] These counts therefore fail as well.

iii. Counts 48-49 (ITSP)

Count 48 alleges a wire transfer on August 1, 1997 of $14 million from the CARPO-53

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[10] While no "tracing" per se was required with respect to the wire fraud counts, the government was required to demonstrate that the wire transfers in question were used to further the fraudulent scheme. *See* 18 U.S.C. § 1343; Instruction Nos. 48, 53. (The only use of the wires alleged or argued by the government to support the wire fraud counts were the charged wire transfers.) Throughout this case, however, the government has not been able to explain how the charged wire transfers could be in furtherance of the fraud *other than by* containing the proceeds of the fraud. The government attempted to provide an example of how a charged wire transfer might be in furtherance of the fraud without containing proceeds of the fraud for the first time at the hearing on this motion. *See* 10/6/04 Tr. at 33-37. Having considered the arguments, the court finds that the jury was not provided a basis on which it could have reasonably found the wire transfers in Counts 20 through 23 (and Count 24—*see infra*) to have been in furtherance of the fraud.

[11] The government also repeats its suggestion that some of the Naukovy money may have been included in this transfer. As explained above with respect to Counts 20 through 23 and 43 through 46, such a finding would be based upon speculation.

account to a EuroFed correspondent account at Pacific Bank in the Northern District of California. Count 49 alleges a second wire transfer of an additional $14 million on the same day from the CARPO-53 account to a Eurofed account at Commercial Bank in San Francisco.

At the time the two $14 million transfers were withdrawn from the CARPO-53 account, it is undisputed that the balance of the account was $126 million; $96 million remaining after the transfers were carried out. 4/22/04 RT 122, 4/23/04 RT 72. The government argues that a large portion of the $126 million is attributable to "dirty" money. Opp. at 90-91. However, even assuming *arguendo* that *all* of the claimed "dirty" money in this case, $44 million ($30 million in extortion payments from Kirichenko, $14 million derived from Naukovy fraud), was present in the CARPO-53 account at the time of the two $14 million transfers, there were sufficient "clean" funds in CARPO-53 at the time of the $28 million withdrawal to cover them. *See* Instruction No. 60 ("If you find that clean funds in the account were sufficient to cover the amount withdrawn for the purpose of making the wire transfer, then you must conclude that the government has not met its burden of proving that the charged wire transfer at issue involved at least $5,000 of money stolen or taken by fraud"). Accordingly, Defendant's motion is granted with respect to Counts 48 and 49.[12]

iv. Count 50 (ITSP)

The wire transfer at issue in Count 50 alleges a transfer of $24 million on November 24, 1997 between the EuroFed Credit Suisse account and a EuroFed account at Hambrecht and Quist in the Northern District of California. The government concedes that the EuroFed Credit Suisse account contained over $95 million at the time of the $24 million transfer. Opp. at 92. Defendant therefore had to be acquitted on Count 50 unless the government proved beyond a reasonable doubt that the Credit Suisse account contained less than $24 million in "clean" money. *See* Instruction No. 60. Even if every dollar of the $44 million alleged to be illegal proceeds from Kirichenko extortion and Naukovy fraud had been in the Credit Suisse account on November 24, 1997, however, the "clean"

[12] *United States v. Davis*, 226 F.3d 346, 356 (5th Cir. 2000), cited by the government, is inapposite. The court in *Davis* noted the Fifth Circuit rule that when the aggregate amount withdrawn from an account containing commingled funds exceeds the "clean" funds, individual withdrawals may be said to contain tainted money, even if a particular withdrawal was less than the amount of "clean" money in the account. *Id.* However, even if *Davis* and its progeny assist the government as to Counts 48 or 49 (or as to other counts, for that matter), the aggregation theory applied in that line of cases was not fairly before the jury in this case.

funds in the account would have been over $50 million, more than twice as much as the charged $24 million transfer. Accordingly, Defendant is entitled to acquittal on Count 50.

v. Counts 51-52 (ITSP)

These two counts rest on two wire transfers of $9 million on July 24, 1998 and $5.3 million on August 5, 1998 from the Lady Lake account at Banque SCS Alliance in the Bahamas to a EuroFed account at Commercial Bank in San Francisco. The parties agree that the money in the Lady Lake account came from the transfer of $48 million from the CARPO-53 account. The record also reflects, and the government does not dispute, that there was $96 million in the CARPO-53 account at the time the $48 million was transferred to the Lady Lake account. Even assuming that all $44 million of the allegedly illegal monies attributable to Kirichenko extortion and Naukovy fraud had been in the CARPO-53 account when the $48 million transfer was made, the "clean" funds in the account would have totaled approximately $52 million, more than the $48 million withdrawal. Accordingly, the $48 million transfer must be deemed "clean" for ITSP purposes. *See* Instruction No. 60. Because, as noted above, all of the money in the Lady Lake account during the relevant time period derived from that $48 million transfer, any subsequent transfer out of the Lady Lake account must also be deemed "clean" for ITSP purposes. Defendant is therefore entitled to acquittal on Counts 51 and 52.

c. The Scheme to Defraud

Defendant renews in his motion the argument that, given that the scheme charged in Counts 9 through 30 "sprawled over disparate subjects and different time periods," the government could not have met its burden of proving Defendant guilty of participation in the same single scheme to defraud and that the scheme is the same scheme as the one alleged in the SSI. Defendant's Renewed Motion Under Rule 29 and Motion for a New Trial ("Mot.") at 33-34. The Court disagrees. Having reviewed the evidence submitted at trial, the Court finds that a reasonable jury could have found both to have been proven, and did so here.

d. Honest Services Fraud As Independent Basis For Wire Fraud Charges

Defendant argues, as he did in his second preclusion motion, that because the SSI does not and could not allege that the proceeds of an honest services fraud passed over U.S. wires, the honest

services theory cannot provide an independent basis for the wire fraud charges. Mot. at 35-37. The Court need not reach this argument, however, as the surviving wire fraud counts are independently supported by the government's property fraud theory, as explained herein. *See also* Special Verdict Form at 6-9. Defendant's argument therefore fails.

e. Previously Raised Arguments

Defendant raises in his motion several other arguments he has previously asserted. As they relate to wire fraud, these include: (1) the wire fraud statutes do not reach an honest services fraud perpetrated in Ukraine; and (2) to the extent they are founded on an honest services fraud theory of wire fraud, 18 U.S.C. sections 1343 and 1346 are unconstitutionally vague as applied to Defendant.[13] The Court disagrees with the government that Defendant is barred from raising these claims again by the "law of the case" doctrine. *See, e.g., United States v. Maybusher*, 735 F.2d 366, 370 (9th Cir. 1984) (law of the case doctrine "expresses only the practice of courts generally to refuse to reopen questions formerly decided, and is not a limitation of their power"). Nevertheless, the Court has thoroughly considered these arguments before and rejected them, and Defendant's contentions in the current round of briefing do not persuade the Court that its previous rulings were erroneous. Accordingly, those rulings will not be disturbed.[14]

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[13] Defendant also raises another issue he has raised before—that the charged wire transfers were, if anything, merely "part of an after-the-fact transaction that, although foreseeable, was not in furtherance of the defendant's fraudulent scheme." Mot. at 23 (citing *United States v. Lo*, 231 F.3d 471, 478 (9th Cir. 2000)). The argument is that because the allegations relating to UESU and GHP were removed from the case by virtue of the mid-trial Rule 29 order, there is no "bridge" to get from the early part of the scheme to the charged wire transfers (which started in 1997). As the government notes, however, Defendant's failure to disclose his foreign bank accounts and receipt of funds from Kirichenko and Naukovy were asserted as an ongoing part of the scheme to defraud that spanned from 1992 to 1998. These allegations survived the mid-trial Rule 29 order.

[14] The Court takes note of the recent decision in *United States v. Giffen*, 326 F. Supp. 2d 497 (S.D.N.Y. 2004), which found 28 U.S.C. § 1346 unconstitutionally vague as to the defendant in that case. In *Giffen*, the charges (including the charge of honest services fraud) rested on the defendant's alleged bribery of Kazakhstan officials to obtain business for his New York company. The court ruled, *inter alia*, that section 1346 was unconstitutionally vague as applied to Giffen's services (which were quasi-official in nature) rendered to a foreign citizenry. The decision is distinguishable from this case in two respects, however. First, the court appeared to be concerned with the fact that the government's honest services fraud theory required a determination of what constituted honest services "in the Kazakh landscape, untethered to any Kazakh statute analogous to Section 1346." *Id.* at 507. The court noted that this was in contrast to this Court's ruling in the present case requiring the government to show the existence of a law in Ukraine analogous to section 1346 that was violated by Defendant. *Id.* at 505. Moreover, whatever difficulty Giffen, a U.S. citizen, may have had in deciphering "the compact between

2. Money Laundering

Defendant attacks the money laundering charges on a number of fronts.[15] Chief among them is the claim that, in proving at trial the relationship between Kirichenko and Defendant, the government proved bribery at most, not extortion.[16] Defendant attempted to show that the relationship was far less than even bribery at trial; days of testimony were consumed by efforts to show that Defendant and Kirichenko were business partners and friends. The jury did not accept this story. Instead, after hearing much testimony and being instructed on the law, the jury found that Kirichenko had been extorted by Defendant. The Court cannot say that the jury's finding was unreasonable as a matter of law.[17]

a. Count 1 (Conspiracy to Launder Money)

i. Variance

Defendant contends that a result of the Court's mid-trial Rule 29 order—which struck allegations regarding the UESU and GHP frauds and the Dityatkovsky extortion—was the government's failure to prove the single conspiracy charged in the indictment. Mot. at 78-79. There were two charged co-conspirators (Defendant and Kirichenko) and one conspiratorial goal in this case, to launder money Defendant unlawfully received. *See* SSI ¶¶ 15-26. There is substantial

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Kazakh citizens and their government" (*Id.* at 506-07), the Court doubts that Defendant, a citizen of Ukraine all his life who ascended to the position of Prime Minister, could claim to have the same difficulties with respect to the compact between Ukrainian citizens and their government.

[15] The Court notes Defendant's arguments that (1) ITSP and wire fraud cannot serve as predicate activity if they involve foreign corruption and (2) the money laundering counts did not sufficiently plead extortion because they did not state the specific provisions of Ukrainian law that Defendant allegedly violated. Defendant has made these arguments before and they were rejected by the Court. Defendant provides no compelling basis in its present motion to alter those rulings.

[16] Defendant also suggests that Kirichenko could not have been the victim of extortion and at the same time conspired with Defendant to launder the money that Defendant allegedly received from extortion and fraud. Mot. at 75. The Court is not convinced that these two roles are mutually exclusive, and a review of the elements of the offenses shows that they are not. *Compare* Instruction Nos. 24 (conspiracy elements) with 37 and 39 (extortion elements). This is especially so in a case such as this, where the government has argued that "the kind of economic threat posed by the defendant to Kirichenko's business did not, as Kirichenko himself testified, completely overbear his free will or prevent him from voluntarily agreeing with the defendant to launder money." Opp. at 49.

[17] This is the case even if, as Defendant vigorously insists, extortion occurs only when "the defendant purports to have the power to hurt the victim" (Opp. at 72 (citing *United States v. Valenzeno*, 123 F.3d 365, 369 (6th Cir. 1997))) or the victim "feared some negative intervention for nonpayment." Opp. at 72 (citing *United States v. Capo*, 817 F.2d 947, 954 (2d Cir. 1987)).

evidence in the record that Defendant and Kirichenko agreed to use Kirichenko's and Defendant's bank accounts to conceal and disguise the money Defendant was receiving from unlawful activity. The Court's dismissal of some of the allegations of the conspiracy count and some of the counts relating to those allegations, thereby eliminating some of the underlying unlawful activity, did not convert the single conspiracy alleged to multiple conspiracies. Rather, it simply narrowed the charged single conspiracy. Accordingly, Defendant's argument here is unavailing.

ii. Sufficiency of the Evidence

Having reviewed again the evidence supporting the conspiracy count, the Court finds that a reasonable jury could have found that Defendant and Kirichenko engaged in a conspiracy to launder the proceeds of foreign extortion, wire fraud and/or property stolen or taken by fraud.[18]

b. Counts 2-5

Counts 2 through 5 charge four wire transfers from the ABS account in San Francisco to accounts in Geneva in the second half of 1994 and January of 1995. Apart from his contention that the specified unlawful activities that would underlie these claims are unproven and legally inadequate—a contention that the Court has rejected—Defendant asserts that the government did not adequately prove that these four wires contained the proceeds of any unlawful activity. In contrast to wire fraud and ITSP, however, tracing in the money laundering context requires the government to demonstrate only that "the funds in question came from an account in which tainted proceeds were commingled with other funds." *United States v. Garcia*, 37 F.3d 1359, 1365 (9th Cir. 1994). Viewing the record in light of this standard, the Court finds that a reasonable jury could find, and here did, that the four charged transfers in Counts 2 through 5 were traceable to a tainted account. Defendant's attack on these counts is therefore without merit.

c. Count 6

Count 6 alleges a transfer of $6 million in November of 1997 involving an internal movement of funds from one EuroFed account in San Francisco at the Commercial Bank to another at Hambrecht and Quist. The parties agree that the funds contained in the Count 6 transfer came

[18] Even assuming the government was required to prove that Kirichenko knew the Naukovy funds were the proceeds of unlawful activity to maintain the conspiracy charge, there is sufficient evidence in the record from which a reasonable jury could have concluded that this showing was made.

from the Count 26/Count 49 transfer of $14 million from the CARPO-53 account to the Commercial Bank on August 1, 1997. Because the transfer from the CARPO-53 account must be deemed "clean" for purposes of the ITSP (and wire fraud) charge, Defendant argues, so must a subsequent transfer traceable to those funds be deemed "clean" for purposes of money laundering. As noted above with respect to Counts 2 through 5, however, in a money laundering tracing analysis the government is required to demonstrate only that the funds in question came from an account in which tainted proceeds were commingled with other funds. The Court has *not* held that the CARPO-53 account was "clean" in its entirety, and it would not be unreasonable for a jury to find that there were some tainted funds in that account. Because a jury could, and did, reasonably reach that conclusion, the $6 million transfer traceable to CARPO-53 could reasonably be deemed tainted as well. Count 6 therefore survives Defendant's motion.

d. Counts 7-8

Count 7 alleges the drawing of a check on August 31, 1998 on the Dugsbery account in San Francisco for the purchase of the Obertz Lane residence. Count 8 alleges a final transfer of funds from Dugsbery to a bank in Boston in September of 1998. The record reflects that the funds in the Dugsbery account were attributable, in part, to a $5.3 million transfer from Lady Lake on August 5, 1998. Lady Lake, in turn, had been funded with a $48 million transfer from Defendant's CARPO-53 account on August 1, 1998. Because the transfers alleged in Counts 7 and 8 derived from an account that a jury could reasonably have found to have contained tainted funds (CARPO-53), Defendant's motion with respect to these counts is denied.

3. Interstate Transportation of Stolen Property

Defendant advances two legal arguments in support of his contention that the ITSP charges must fail.[19] Opp. at 46-51. First, he claims that the SSI failed to provide notice of one of the government's theories underlying the ITSP charges—that Defendant extorted money from Kirichenko by threat of economic harm. Second, he asserts that there was no "fair warning" that this theory would be used to convict him of these counts, given that extortion by economic threat (at least

[19] Aside from his contention that there was a lack of evidentiary support for the government's Kirichenko extortion theory and Naukovy fraud theory, discussed above.

of the variety seen in this case) cannot be a basis for an ITSP charge. Both arguments are without merit.

With respect to the constructive amendment claim, Defendant maintains that it is clear from the SSI that the ITSP counts "were based on a theory that the charged transfers contained money that Lazarenko was receiving in those years from Tymoshenko, Somolli, UESU, UEIL, Itera, as well as the housing deal involving GHP." Mot. at 48. The SSI, however, does not limit the ITSP charges in the way Defendant claims. The Court finds that the SSI provided Defendant with fair notice of the conduct with which he was charged and the theory of liability that he needed to defend against.

Defendant also argues that fair notice was lacking because under no reasonable construction of the ITSP statute, 18 U.S.C. § 2314, does extortion by economic threat (on these facts) constitute theft. However, the Court resolved this issue in the government's favor at the jury instruction hearing after having had the benefit of briefing and argument by the parties. Defendant provides no argument now that changes the Court's view on this issue.

a. Count 31

This count rests on the allegations that in 1992 Defendant obtained $2.4 million from the Nikopolsky Metal Works by fraud, then had the money transferred to a Van der Ploeg account in the Netherlands used by Naukovy Farms, from which $1.2 million was transferred to a Hungarian account controlled by Agafonov in January of 1993, from which $1.205 million was transferred to Defendant's Lip Handel account in Switzerland in June of 1993,[20] leading to the charged wire transfer on July 1, 1994 of $1.8 million from the Lip Handel account to an ABS account in the

[20] Defendant suggests that it is likely that the Hungarian account from which this $1.205 million derived may have contained sufficient "clean" funds to cover the $1.205 million transfer, but that there are no records from that bank to substantiate the claim. Mot. at 18-19. Defendant argues that it is the government's burden to prove to the contrary. The Court disagrees that the government carries the burden here. As a result, the issue of access to evidence becomes a question of due process. The Court finds that Defendant has not established a factual record to establish a constitutional violation. In particular, Defendant has made no showing that the documents in question are within the custody and control of the government.

Defendant also contends that there were other deposits going into Defendant's Lip Handel account (unrelated to Kirichenko extortion or Naukovy fraud) totaling $2.5 million prior to the $1.8 million withdrawal at issue. Mot. at 18-20; Reply at 22. The argument, therefore, is that there were sufficient "clean" funds to cover the $1.8 million transfer. According to the jury instructions, however, the argument can only succeed if, at the time of the transfer, there were sufficient "clean" funds in the account to cover the withdrawal. *See* Instruction No. 60. But Defendant admits that the $1.8 million withdrawal "effectively [] closed" the Lip Handel account. Mot. at 18. This argument therefore fails.

Northern District of California. Having reviewed the record, the Court finds that a reasonable jury could have concluded that the wire transfer at issue contained at least $5,000 in proceeds that Defendant knew to have been taken or stolen by fraud.[21]

II. MOTION FOR A NEW TRIAL

Defendant argues that if the Court decides his Rule 29 motion should be denied in its entirety or in part, the result should be a new trial on the remaining charges. Rule 33 of the Federal Rules of Criminal Procedure provides that a district court "may vacate any judgment and grant a new trial if the interest of justice so requires." Rule 33 is a device to correct a "serious miscarriage of justice." *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992).

Stripping the parties' Rule 33 arguments to their core, the question is essentially this: did the Court's mid-trial Rule 29 order, which removed—in dollar terms—a large amount of the funds at issue in the case, cause a prejudicial "spillover" with respect to the counts that survived the ruling?[22] The authorities cited by Defendant, most of which derive from outside the Ninth Circuit, are distinguishable from this case. Assuming the legal standards from those cases apply here, however, Defendant's Rule 33 motion falls short.

Defendant principally relies on *United States v. Vebeliunas*, 76 F.3d 1283, 1293-94 (2nd Cir. 1996) to provide the analytical framework for his request for a new trial. There, the Second Circuit explained that to establish actionable "retroactive misjoinder,"[23] the defendant must demonstrate

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[21] The Court also finds that the evidence of the "wheat deal" fraud underlying Count 31 is sufficient to support the jury's verdict with respect thereto.

[22] Defendant also contends that the government pursued the theories dismissed in the mid-trial Rule 29 order in bad faith. The Court has presided over this case for five years, however, and has no reason to believe that any attorney involved in this case has acted in bad faith. Defendant's argument to the contrary is therefore rejected.

Defendant further asserts that the government "misled" the jury during its closing argument. Upon reading this argument in Defendant's moving papers, the Court did not recall anything of this nature, having listened very carefully to closing arguments. The Court has now read the transcript of the closing arguments and sees nothing in the government's (or defense counsel's) comments that would affect the fairness of the trial, certainly nothing that "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

[23] "'Retroactive misjoinder' arises where joinder of multiple counts was proper initially, but later developments—such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions—render the initial joinder improper." *Vebeliunas*, 76 F.3d at 1293.

"compelling prejudice," which is determined by: (1) evaluating whether the evidence of the vacated count(s) was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts; (2) comparing the evidence from the dismissed counts to that of the remaining counts and examining the degree of overlap and similarity between the two; and (3) making a general assessment of the strength of the government's case on the remaining counts. *Id.* at 1294 (internal citations and quotations omitted). A review of these factors leads the Court to conclude that a new trial is unwarranted in this case.

First, it would be difficult to argue that any of the evidence admitted to prove the UESU and GHP frauds was "inflammatory."[24] Defendant does not argue to the contrary in his motion. Instead, he claims that the $200 million associated with the dismissed counts lingered in the case, causing the jury to conclude that "there was too much money in the case to acquit." Reply at 42. Defendant asserts that "jurors simply threw up their hands rather than work through the hard task of distinguishing clean from allegedly dirty money . . . ." *Id.* at 43. The Court gives the jury more credit than this. The jury spent four days deliberating in the matter. It must also be noted that a good deal of the questions received from the jury related to bank records. While, as explained above, the Court finds as a matter of law that the jury erred in its tracing analysis with respect to certain counts, the jurors can hardly be said to have "thr[own] up their hands" when faced with the evidence in this case.

In any event, this focus takes us away from evaluating the evidence supporting the dismissed counts itself, which, again, the Court would be hard-pressed to call "inflammatory." Indeed, in its discussion of this issue, Defendant simply detours into an explanation of how his strategic choices at trial would have been different had the removed theories not been in the case at the start of the trial. Mot. at 84. With respect to the issue of "inflammatory" spillover evidence, then, this case looks little like *United States v. Dinome*, 954 F.2d 839, 844 (2nd Cir. 1992), cited by Defendant, in which the evidence introduced at trial in support of the dismissed counts related to "vicious murders, loansharking, auto theft, pornography and firearms trafficking" when the surviving counts consisted

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[24] As previously noted, the mid-trial Rule 29 order also dismissed allegations relating to the extortion of Alexei Dityatkosvky. However, no evidence relating to this issue was introduced at trial.

of only mail and wire fraud. *Id.* at 844. The "inflammatory" evidence factor, therefore, weighs in the government's favor.

The second factor in the *Vebeliunas* prejudice analysis requires the Court to examine "the degree of overlap and similarity between" the evidence from the dismissed counts and that of the remaining counts, and here Defendant is on stronger ground. The Court agrees with Defendant that not all of the evidence relating to the dismissed counts would have been independently admissible had, say, the UESU and GHP theories been dismissed *prior* to trial. This factor, therefore, favors Defendant.

Finally, the Court is to "make a general assessment of the strength of the government's case on the remaining counts." *Vebeliunas*, 76 F.3d at 1294. Having considered the strenght of the evidence admitted by the government against the Defendant on the remaining counts, the Court finds that the third *Vebeliunas* factor favors the government.

In sum, Defendant has failed to demonstrate the "compelling prejudice" sufficient to warrant a new trial under Rule 33. The Court is not unmindful of the challenge faced by Defendant resulting from the mid-trial Rule 29 order. The Court can certainly envision instances where the evidence left to linger in a case following a mid-trial Rule 29 order, as in *Dinome*, warrants the grant of a new trial. Having sat through the trial in this case, however, the Court is convinced that Defendant remained in a fair position to defend against the charges he faced even after the unproven allegations were stricken. Denying Defendant's motion for a new trial, in the Court's view, will not result in a "miscarriage of justice." *Alston*, 974 F.2d at 1211.

CONCLUSION

For the reasons set forth above, the Rule 29 motion is **GRANTED IN PART** and **DENIED IN PART** and the motion for a new trial is **DENIED**. Defendant is entitled to acquittal on Counts **20** through **24** and **43** through **52**. Counts **1** through **8**, **25** through **29**, and **31** survive.[25]

[25] Defendant's recent submission of a late-breaking Ukrainian decision concerning now Prime Minister Yulia Tymoshenko has no effect on the resolution of this motion. Even if the decision rendered erroneous the jury instructions regarding extortion in this case (Instruction Nos. 38, 41)—which the Court doubts—the surviving counts are independently supported by the government's fraud theories.

The parties are ordered to appear at a status conference on June 23, 2005, at 2:00 p.m., in Courtroom 11 to set a date for judgment and sentence in this matter. The parties are further ordered to submit, five days prior to the conference, a status conference statement.

IT IS SO ORDERED.

Dated: May 20, 2005

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

US,

Plaintiff,

v.

Pavel Ivanovich Lazarenko,

Defendant.

Case Number: CR00-00284 MJJ

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on May 20, 2005, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: May 20, 2005

Richard W. Wieking, Clerk

By: Monica Tutson, Deputy Clerk